IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2114 OF 2004

Gopinath Daulat Dalvi,)

C/403, Akshardam, P.G.)

Road, Ranjan Pada, Malad (W),)

Mumbai-400 064.)

Versus

1. State of Maharashtra)

Notice through Government)

Pleader, High Court, Bombay)

2. Shri N.D. Rathod,)

Conciliation Officer under)

the provisions of Industrial)

Disputes Act, 1947 office)

of the Commissioner of Labour)

Commerce Centre, 6/7th Floor)

Tardeo, Mumbai-400 034.)..RESPODNENTS

3.M/s.Marubeni India Pvt. Ltd.)

25, Mittal Chamber,)

Nariman Point, Mumbai-400 021.)

Mr.M.D. Nagle, for the Petitioner

Mr. P.K. Rele, Sr. Counsel with Mr. Piyush Shah, for

Respondents

CORAM: F.I. REBELLO J.

DATE : 27th October, 2004

JUDGMENT:

. The petitioner was employed with the respondent

No.3 as a Driver. He joined the service of Marubeni Corporation, Tokyo with effect from 1st May, 1981. The petitioner's admitted date of birth is 30th June, 1947. While the petitioner was in service Marubeni Corporation which was taken over by respondent No.3 on 21st May, 1996. On 21st May, 1996 Marubeni Corporation, Tokyo, Japan issued a letter that it had decided to close down its office in India. However, the respondent No.3 a subsidiary Company had been incorporated on 21st May, 1996 for the purpose of carrying out the business activities in India and the respondent No.3 had agreed to take over the service of all employees in India of Marubeni Corporation including the petitioner in the same position and on same terms and conditions of service. In view of that the petitioner's services were transferred from Marubeni Corporation to Respondent No.3 in the same position and on the same terms and conditions of service with continuity of service with effect from 1st June, 1996. It is the case of the petitioner that during the employment with the respondent No.3 company the company introduced Employees Service Rules in respect of employees employed by them, in the month of April, 2000. Inspite of specific understanding between the employees employed by the respondent No.3 Company and the Respondent No.3 company that the employee will continue the terms and conditions of service prior to incorporation of the respondent No.3 company, the service Rules framed provided that the age of

retirement would be on attaining the age of 56 years and the date of superannuation will be the last date of that month.

. The petitioner addressed a letter dated 7th April, 2003 setting out that he was not accepting the Employees Service Rules which included age of superannuation. The respondent No.3 company replied, pointing out that the provisions of the Industrial Employment Standing Order Act, 1948 and Model Standing Orders are not applicable to the establishment of respondent No.3 company. It is the case of the petitioner that the service Rules of the respondent No.3 cannot supersede the Employment Standing Order Act, 1948 and Model Standing Order. it was the contention of the petitioner that he was entitled to be employed till he reached the age of superannuation i.e. 60 years as per the Shops and Establishment Act read with and Industrial employment Standing Order Act, 1948 and the Model Standing Order framed thereunder. The respondent No.3 instead of allowing the petitioner to continue till the age of 60 years allowed the petitioner to work upto 30th June, 2003 and on 1st July, 2003 when he reported for work the respondent No.3 compelled him to sign Form "H". The same is not applicable as the appropriate Government for Respondent No.3 company is the State Government and not the Central Government. Form H is prescribed under the Industrial Disputes (Central) Rules 1957. The petitioner was offered lumpsum of Rs.50,000/- by way of

ex-gratia from which a sum of Rs.14,046/- has been deducted as TDS amount and thereby he has received ex-gratia amount of Rs.35,954/- on 1st July, 2003.

. Against his termination the petitioner raised a demand for reinstatement with continuity of service and full back wages with effect from 1st July, 2003 and also filed Justification in support of the demand to the Deputy Commissioner of Labour. The Respondent No.2 fixed a meeting. The respondent No.3 filed a reply. During the pendency of the proceedings with the Conciliation Officer one Smt. Sangeeta Bharti, Sole Arbitrator appointed by the respondent No.3 issued a notice. It is the grievance of the petitioner that instead of admitting the present dispute in conciliation under Section 2(A) and submitting a failure report the respondent No.2 addressed a letter dated 5th June, 2004 declining to intervene. It is this order which is the subject matter of the present petition.

2. The respondent No.3 has filed their affidavit through one Sanjay Arora, Manager, Administration Department. It is contended that the petitioner had arrived at a settlement dated 1st July, 2003 and had received, accepted and encashed the benefits payable to him on superannuation and is now estopped from raising any dispute on his being superannuated. It is pointed out that when the petitioner was employed with effect from 1st May, 1981 by Marubeni Corporation as Driver

the provisions for retirement read as under:-

"The employees will retire from the Company on attaining age of fifty-six (56) years."

The respondent No.3 has framed Service Rules. There is also service rules for superannuation which reads as under:-

"An employee will be superannuated on attaining the age of Fifty Six (56). The date of superannuation will be last day of the month."

The petitioner was accordingly superannuated in terms of the Service Rules. As the petitioner raised some disputes pursuant to discussion and negotiations a settlement was arrived at on 1st July, 2003 and the Petitioner accepted the retirement as effected at the age of 56 years as legal, valid and binding and agreed to accept the amount payable under the settlement in full and final settlement of all his claims. Petitioner was accordingly paid his dues and also terminal benefits which he has received. After encashment of the cheque on 7th July, 2003 petitioner made a demand for reinstatement. It is submitted that in these circumstances the respondent No.2 was right in refusing to entertain the frivolous dispute and as such no case has been made out for entertaining the present petition under Article 226 of the Constitution of India.

3. At the hearing of the petition on behalf of the petitioner his learned Counsel has formulated the following points:-

(a) The Conciliation Officer acted without jurisdiction in refusing to take the matter in conciliation. Once the matter was before the Conciliation Officer his jurisdiction was limited to send a failure report to the appropriate government. The respondent No.2 has failed to discharge his statutory obligations and consequently, the impugned order dated 5th June, 2004 is liable to be set aside being without jurisdiction.

(b) The settlement was entered into in Form H which is under the Central Rules and that would be only applicable if the appropriate Government was the Central Government. In the instant case the appropriate Government is the State Government and in these circumstances the settlement entered into is not binding.

(c) It is next submitted that the agreement entered into provides for arbitration. In view of Section 23 of the Indian Contract Act any agreement restraining the petitioner from proceeding with the legal proceedings under the provisions of the I.D. Act would be void.

(d) Lastly, it is submitted that the establishment is covered by the Shops and Establishment Act and, therefore, the Model Standing Orders apply. If the Model Standing Orders apply, the age of retirement is 60 years and consequently, the action of the respondents is null and void.

4. We may now take up the first contention as advanced on behalf of the petitioner herein. It is true that once the matter is taken in conciliation and if no settlement is arrived at, the Conciliation Officer shall as soon as practicable after the close of investigations send to the Appropriate Government, failure report together with full statement of facts and the circumstances and the reasons on account of which in his opinion a settlement could not be arrived at in terms of Section 12(4) of the I.D. Act, 1947. The contentions of the petitioners, therefore, in law seem to be correct. However that will be the position in law if the matter was taken in conciliation. The Conciliation Officer in the instant case though held meetings between the parties, did not think it fit to enter into conciliation proceedings as contemplated by Section 12(1) of the I.D. Act and consequently so informed the petitioner. The Conciliation Officer on a matter brought to his notice is not bound to immediately take up the matter in conciliation. It is open to have preparatory meetings to have parties put

up their respective stands before taking the matter in conciliation. There must be prima facie satisfaction that on the facts brought before him that there is in existence or apprehended, an industrial dispute or an individual dispute. It is only then that the Conciliation Officer is bound to enter into conciliation in an attempt to negotiate a settlement between the parties on failure to send a failure report to the State Government. In the case of **Paints Employees' Union (by General Secretary) & Anr. vs. Nail (M.D.) (Assistant Commissioner of Labour at Bombay) & Anr., 1968 (1) L.L.J.519**, the Conciliation Officer after satisfying himself that the management had acted bonafide in the matter refused to take up the dispute in conciliation. That was the subject matter of a challenge before the learned Division Bench of this Court. The learned Division Bench held that such an order is purely administrative in character. On facts it held that considering the satisfaction by the Conciliation Officer it would not be a fit case for the Court to exercise its extra ordinary jurisdiction. In the instant case the petitioner had entered into a settlement with respondent No.3. That settlement was entered into on 1st July, 2003. That settlement was placed before the Conciliation Officer. That settlement provided that the dispute which the petitioner had raised about age of retirement had been settled. It was further provided that if there be any dispute arising out of the settlement it would be open to the parties to refer the matter to arbitration.

Therefore, before the Conciliation Officer there was material to show that the dispute had been settled. That settlement was entered into in Form H and forwarded to the relevant authorities. It is on these facts that the Conciliation Officer by his communication of 5th June, 2004 took the view that this was not a matter to be taken into conciliation and, therefore, proposed not to intervene in the matter. The argument of the petitioner could have been accepted if the Conciliation Officer had taken the matter in conciliation. Once a matter is taken in conciliation the jurisdiction of the Conciliation Officer is restricted and limited to submit a failure report to the State Government.

. In the instant case, however, what was in issue was whether there existed an industrial dispute, considering the settlement which ought to be taken into conciliation. The material on record showed that the employees of Marubeni Corporation had been taken over by M/s.Marubeni India Pvt. Ltd. on the same terms and conditions with continuity of service. It is in these circumstances that the learned Conciliation Officer was pleased to refuse to enter into conciliation. The Respondent company had filed their statement before the Conciliation Officer wherein they had adverted to the settlement arrived at and further that there was no change in the far as age of retirement both in the Respondent company as also the predecessor company. Considering the judgment in the case of Paints

Employees Union (supra) this would, therefore, not be a fit case for this Court to exercise its extra ordinary jurisdiction on this ground. The exercise of power by the Conciliation Officer, which is administrative in nature is like the exercise of power by the Appropriate Government under Section 12(5). An order passed under Section 12(5) is also an Administrative order. Gainful reference can be made to **Telco Convoy Drivers Mazdoor Sangh & Anr. v. State of Bihar and Ors., AIR 1989 SC 1565,** where the Apex Court observed that "Where, as in the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the Government in exercise of its administrative function under Section 10(1) of the Act." In M.P. Irrigation Karmachari Sangh the Apex Court observed that there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further, the Government should be very show to attempt an examination of the demand with a view to declining reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the tribunal for adjudication of the valid disputes, and that to allow the Government to do so would be to render Section 10 and Section 12(5) of the Act nugatory." It is thus clear that the power being administrative the Court will normally not interfere with that exercise of power. It is only in the event the Court comes to the conclusion that there has been

failure by the conciliation officer to exercise jurisdiction, when prima facie there exists a dispute would this Court interfere in the exercise of its extra ordinary jurisdiction.. In a case where no dispute exists as in the instant case on account of the settlement no interference is called for.

6. We then come to the second contention that the settlement in form H is not a legal settlement. Both the parties were aware that they were entering into a settlement. That settlement has been entered into in Form H and copy sent to the Appropriate Authorities. Assuming it is not made in the form as required by the State Rules cannot result in holding that the settlement entered into between the petitioner and the respondent company is a nullity at law. At the highest it my amount to an irregularity. Parties were aware of what they were entering into. The petitioner took benefit of the settlement by encashing the cheque issued in terms of the settlement. Once that be the case, it will not be possible for this Court in the exercise of its extra ordinary jurisdiction to interfere with the settlement entered into. That contention must also be rejected. In such position the petitioner must show that entering into a settlement in form "H" was illegal and not irregular and consequently the settlement itself is not valid in law. The petitioner has failed to discharge that burden.

7. It was next sought to be contended on behalf of

the petitioner that merely because the petitioner has accepted the compensation cannot deprive him of his right. It is submitted that entitlement to wages would be a part of his right to life and for that purpose reliance is placed on the judgment in the case of **Narsing Pal and Union of India & Ors., 2000 (85) FLR 458**. In that case compensation was claimed on the ground that the services of the petitioner had been retrenched. The Apex Court held that it was a case of dismissal. The petitioner had accepted compensation which the Court held was accepted by him to sustain himself. It was sought to be contended on behalf of the Union of India that having accepted the compensation it was not open to the petitioner to challenge the retrenchment. That was negatived by the Apex Court by holding that merely because some compensation was received does not mean that the petitioner therein had surrendered all his constitutional rights in favour of the respondent. The Apex Court further noted that fundamental rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of Fundamental Rights available under the Constitution. Those observations were made in the context of a petition under Articles 311 and 21 of the Constitution of India. In the instant case the dispute was about the age of superannuation. That came to be resolved by a settlement. A settlement under the I.D. Act has got its own sanctity. It brings to an end the disputes between an employee and the employer in the

case of individual disputes and continues to bind the parties to the settlement as long as the settlement is a valid settlement. In the light of that the said contention must be rejected.

8. It is then contended that an agreement providing for arbitration of settling an industrial dispute would clearly be contrary to the provisions of the Industrial Disputes Act, 1947. Firstly, we must note that there is a settlement entered into under the provisions of the Industrial Disputes Act, 1947. The settlement contains an arbitral clause providing for arbitration, if there be a difference between the parties as to the interpretation of the settlement. Under Section 28 of the Indian Contract Act every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extent. However, Exception 1 provides that the section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. Similarly, Exception 2 says that any agreement by which parties agree to refer to arbitration any question between them which has already arisen, or affect any

provision of any provision of any law in force for the time being as to reference to arbitration.

. It is true that on a consideration of the provisions of the Industrial Disputes Act, 1947 the provisions of the said Act being special provision will have to be adhered to by resorting to the procedure contained under the said Act. Therefore, in a case of industrial dispute or individual dispute resolution of a dispute to have binding effect has to be by a settlement in terms as required under the provisions of the Industrial Disputes Act or by resorting to the Tribunal under the Act in the manner provided by the Act. That will happen on a reference of the dispute by the Appropriate Government to a Tribunal or by voluntary reference by the parties under Section 10A of getting their disputes adjudicated by an Arbitrator. That reference to arbitrator has to be in the manner provided under Section 10A of the Act. Section 10A(4) itself provides that nothing in the Arbitration Act, 1940 shall apply to Arbitration under the Section. Tribunal. Once a right is created under the Act, a remedy has been provided and procedure for enforcement of the same, it will not be possible to accept that it will be open to the parties considering the provisions of the Industrial Disputes Act, 1947 to give a by-pass to the provisions of the Act. Any industrial or individual dispute, can only be settled in terms of the Act either by a forum under the Act or in the manner contemplated by the Act either in the form of

settlement under Section 2(p) or under Section 12 and becomes binding under Section 18 of the Act. These are the only known methods by which the Industrial and individual disputes can be resolved under the mechanism provided under the Industrial Disputes Act, 1947 apart from an award on reference.

. In the instant case the dispute was resolved by a settlement under Section 2(p) of the Industrial Disputes Act. That settlement contained a provision for arbitration. The question is whether such a clause in the agreement is void considering the provisions of the Industrial Dispute Act or Section 28 of the Indian Contract Act. In my opinion such a contract would not be void considering the provisions of Section 28 of the Contract Act. The provisions for Arbitration is not in respect of the dispute. The dispute was resolved by signing the settlement. The provisions for arbitration arises if difference arises about the contract or a settlement and the terms as contained therein. Such an agreement for arbitration for resolution of the disputes arising under the settlement really cannot be said to be void or contrary to Section 28 of the Contract Act. It also cannot be said that such a clause in the settlement is contrary to statute and, therefore, not binding. In the case of Bombay Municipal Executive Staff Union & Ors. vs. The Municipal Commissioner & Ors., 1991 II CLR 716, the issue before the learned single Judge was of an agreement being in contravention of the provisions of a

binding statute. In that case the settlement entered into was held to be illegal and void being in contravention of the provisions of Section 9A of the Act. That is not the case here.

. Apart from that the Arbitration & Conciliation Act, 1996 is now in force. Under Section 16 of the said Act any dispute including whether the settlement is void including voidness of the arbitration clause in the settlement itself, can only be gone into by the learned Arbitrator. Even if it is contended that the contract is void, the arbitration agreement is severable from the contract and it is open to the Arbitrator to decide the issue. If it is the contention of the petitioner that the settlement itself is void for whatever reason it will also be open to a party to urge that contentions before the learned Arbitrator. In the instant case the Arbitral Tribunal has already given notice of its constitution and has assumed jurisdiction. The sitting was to be at Delhi. Learned Counsel on query from the Court as to the place of sitting after taking instructions from the Company has agreed that the Arbitral Tribunal will have its sittings in Mumbai and the costs of the arbitration would be borne by the Company. In my opinion, therefore, that contention also has to be rejected.

9. The last contention is that the establishment is covered by the Shops and Establishment Act and, therefore, the Model Standing Orders will apply. In my

opinion it is not necessary to to into the issue. The Act itself provides that Model Standing Order will apply to establishments which engage more than 100 workmen. The Apex Court considered the issue in Indian Tobacco Company Ltd. vs. Industrial Court, Nagpur & Anr. 1195 1 L.L.N.846. The provisions of the Bombay Shops and Establishments Act, 1948 have been amended whereby the provisions of the Industrial Employment Stand Orders Act are now applicable to an establishment if there be more than 50 or more persons. Once that be the case the ground urged on behalf of the petitioner is also not sustainable.

. In the light of that I find no merit in this petition. Rule discharged. No order as to costs.

. The parties/Authorities to act on an ordinary copy of this order duly authenticated by the Associate/Personal Secretary of this Court.

(F.I. REBELLO, J.)